EXHIBIT B

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Suing Opposing Counsel for Bad Behavior During Litigation

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The incivility between opposing attorneys in litigation and the expansion of lawyers' liability to non-clients have resulted in an increasing number of claims against attorneys by their adversaries for bad behavior in litigation. The results for these plaintiffs have been mixed, but the mere bringing of such a claim can force the defendant attorney to withdraw from representing the client in the underlying case, usually costs the attorney a deductible under the legal malpractice policy, and can cost the insurer defense costs. In the event that the claim is successful, significant damage awards are possible.

At first glance, a claim brought by one party in litigation against the other party's attorney appears to violate the sacred principle that an attorney owes no duty to his adversary. This rule has eroded, however, where attorneys are alleged to have made false statements to their adversaries, where attorneys' conduct violates an ethical rule, or where attorneys allegedly have conspired with their clients to commit a fraud.

Many courts indeed have found that an attorney's conduct in the course of litigation is privileged and immune from liability. Nonetheless, some other courts have determined that if an attorney's conduct rises to the level of fraud or a serious and intentional ethical breach, it may be outside the scope of the immunity and may result in liability.

Claims Based on Discovery Abuses and Concealing Information

Many of these cases arise out of the alleged failure of an attorney to accurately disclose information that is sought in discovery. The widely recognized immunity from suits based on wrongful litigation conduct has resulted in dismissal in many of these cases.[1]

In a few cases, however, courts have determined that the litigation privilege didn't immunize an attorney from suit. In one case, the court permitted a suit for an attorney's misrepresentations during settlement negotiations regarding the amount of insurance coverage for the defendant. The defense attorney had been told of the correct limits of insurance, but he argued that it was unreasonable for opposing counsel to rely on his representations regarding coverage. The court balked at this argument and adopted instead a rule that didn't require plaintiff's counsel to verify the truthfulness of representations made by defense counsel.[2] In another case involving the disclosure of insurance coverage in the context of settlement, the Second Circuit Court of Appeals found that such a misrepresentation was actionable. Interestingly, the Court never discusses the litigation privilege, and the lawyers defended instead on the basis that the plaintiff learned of the misrepresentation before the settlement was

finalized and could have rescinded it.

California has embodied the litigation privilege in a statute. The immunity applies if a statement is made in judicial or quasi-judicial proceedings by litigants or other authorized participants to achieve the objects of the litigation and has some connection with the litigation. The statute specifically excludes from this immunity any statements "made in a judicial proceeding knowingly concealing the existence of an insurance policy or policies." In one case, the court found that an attorney's mischaracterization of a policy as a primary policy when it was an excess policy couldn't be the basis of a suit because the attorney's misrepresentations didn't conceal the policy.[4]

Claims Based on Abusive Litigation Tactics

The litigation privilege also has been used to bar claims based on alleged unfair use of "hardball" litigation tactics. Thus, courts have found that attorneys were immune from claims alleging that they wrongfully instituted a suit to collect money or a judgment for a client, made misrepresentations in pleadings, failed to serve pleadings, asserted frivolous defenses, or interfered with contractual relationships.[5]

At least one court has recognized a tort of malicious defense where an attorney allegedly created false evidence while acting as defense counsel and then gave false testimony advancing this evidence. The New Hampshire Supreme Court said that a claim could exist if the defense attorney acted without probable cause or without any credible basis to support the defense, knowing that the defense lacked merit, but using the defense nonetheless to harass, annoy or injure, or delay or increase the cost of litigation.[6] Such a claim can be brought only if the prior case in which the conduct occurred was terminated in favor of the party bringing the malicious defense action.

The Issue of Sanctions

A few courts that have refused to allow a civil action for damages against attorneys have, nonetheless, permitted sanctions against opposing counsel for violating discovery orders or otherwise acting in violation of rules governing litigation.[7] These courts have found that the threat of sanctions against an attorney is sufficient to deter litigation misconduct.

Conclusion

Regardless of the outcome, the filing of such a claim will always compromise, and in most cases preclude, the attorney's ability to continue representing the client in litigation, which could lead to a claim by the client for the costs of educating a new attorney.

The attorney also must face the prospect that claims alleging fraud may not be subject to indemnity from the insurer and, depending on the wording of the policy, may not even be a claim that the carrier must defend. Moreover, even courts that don't recognize an independent cause of action against an attorney for wrongful litigation conduct may well permit the imposition of sanctions, which are not likely covered by a malpractice policy either.

[1] Donner v. Applaichan Insurance Company, 587 2d So. 2d 797 (Dist. Ct. App. Fla. 1991); Lewis v. American Exploration Company, 4 F. Supp. 2d 673 (S.D. Tex. 1998); Baxt v. Liloia, 155 N.J. 190, 714 A. 2d 271 (1998) (breach of ethical rules does not give rise to a private cause of action).

[2] Fire Insurance Exchange v. Bell, 643 N.E. 2d 310 (Ind. 1994).

[3] Slotkin v. Citizens Casualty Company of New York, 614 F. 2d 301 (2nd Cir.1980).

[4] Morales v. Cooperative of American Physicians, Inc., et al, 180 F. 3d 1060 (9th Cir. 1999).

[5] White v. Bayless, 32 S.W.2d 271 (Tex. Ct. App. 2000); O'Keefe v. Kompa, 84 Cal. App. 4th 130 (Cal. Ct. App. 2000); United States v. Rockland Trust Co., 860 F.Supp. 895 (D. Mass. 1994); Curtis v. Duffy, 742 F. Supp. 34 (D. Mass. 1990); Lewis v. Tulip, 9 F.Supp. 2d 22 (D. Mass. 1998).

[6] Aranson v. Schroeder, 671 A. 2d 1023 (N.H. 1995).

[7] Baxt v. Liloia, 155 N.J. 190, 714 A. 2d 271 (1998); Phipps v. Union Electric Company, 25 S.W. 3d 679 (Mo. Ct. App. 2000).

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